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IN THE

Supreme Court of the United States

——————— TERM, 1974

No. 73-1674

JOHN J. FRANK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John J. Frank prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 25, 1974.

Opinion Below

The opinion of the Court of Appeals, which is unreported, is reprinted in the appendix hereto. No opinion was rendered by the United States District Court, Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1974. A timely petition for rehearing and a hearing *en banc* was denied on April 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether in reviewing the sufficiency of the prosecution's evidence it was constitutionally permissible for the Court of Appeals to sustain the verdict of guilt against petitioner on the ground that because petitioner did not testify or offer any evidence the jury was permitted to draw inferences from said evidence that it would otherwise be impermissible to draw if petitioner had testified in his defense.

2. Did the Court of Appeals apply an improper standard of appellate review of errors, contrary to the criteria established by decisions of this Court, in sustaining petitioner's conviction despite acknowledged errors committed by the trial Court in (a) the faulty and improper use of an interpreter for the principal prosecution witness which unduly restricted the right of petitioner's cross-examination of said witness, and (b) the improper instruction of the trial court to the jury that a conviction would not be res judicata with respect to a pending civil action brought by the main witness against petitioner and the other three co-defendants based upon the same transactions and claim of fraud charged in the indictment or affect such civil action in any manner?

3. Was it a violation of the fundamental principles of international comity and prejudicial error to permit the testimony of two officers of the First National City Bank

formerly employed at the branch in the Bahamas as to bank transactions that took place in the Bahamas, in direct violation of an order of a higher Bahamian Court prohibiting such testimony under the Bank Secrecy Laws of the Bahamas, which order was rendered by the Bahamian Court as a result of the trial Court's own application in the Bahamian Court for said information.

4. Where the prosecution concedes and the Court of Appeals agrees that the acts of the petitioner did not violate the literal language of the statute, does the Court of Appeals' affirmance of the conviction violate the well-established principle that the reach of criminal statutes must be strictly construed?

5. Were the mailings that occurred incidental to or after the alleged scheme and artifice had been completed or accomplished?

Statutory Provisions Involved

Title 18, United States Code §371.

Title 18, United States Code, §1341.

Title 18, United States Code, §1342.

Title 18, United States Code, §2314.

Bahamian Bank Secrecy Law of 1965
Banks Amendments Act, §19.
Banks and Trust Companies Regulation Act 1965, §10.

(The above provisions are set forth in the Appendix hereto).

Statement of the Case

The indictment was filed December 21, 1972 and contained sixteen counts. In addition to petitioner Frank, the indictment named Alfred J. Hemlock, Harry Hoffer, and Stephen Borgman, who were likewise appellants below, and two other defendants, Hebert and Kay, whose cases were severed. Count 1 charged a conspiracy (a) to use the mails for the purpose of executing a scheme and artifice to defraud, in violation of 18 U.S.C. §1341; (b) to use and assume certain fictitious, false and assumed names for the purpose of carrying out such scheme and artifice by means of the mails, in violation of 18 U.S.C. §1342; (c) to use wire, radio and television communication in interstate and foreign commerce for the purpose of executing such scheme and artifice, in violation of 18 U.S.C. §1343; and (d) to transport and cause to be transported in interstate and foreign commerce, money, property and securities of the value of $5,000 or more, in the execution and concealment of such scheme and artifice, knowing the same to have been stolen, converted and taken by fraud, in violation of 18 U.S.C. §2314. Counts 2-5 charged petitioner and the other defendants with unlawful transportation of two certified checks totaling $1,140,000. in interstate and foreign commerce knowing the same to have been stolen, converted, and taken by fraud under 18 U.S.C. §2314. Counts 6 and 7 charged petitioner and the other defendants with using and assuming fictitious, false and assumed names for the purpose of committing such scheme and artifice by means of the mails under 18 U.S.C. §1342. Counts 8-16 charged petitioner and the other defendants with unlawful use of the mails and wire facilities in interstate and foreign commerce under 18 U.S.C. §§ 1341 and 1343.

Petitioner was convicted on Counts 1-7 and acquitted on Counts 8-16. He was sentenced to concurrent five-year terms of imprisonment on each of said counts.

All of the counts of the indictment were predicated on the claim that petitioner Frank and the other defendants had devised a scheme to defraud Mrs. Maria de los Angeles Trujillo de Dominguez (daughter of the late dictator of the Dominican Republic) and Plan-In-Vest Planning & Investing Co., S.A. (hereinafter referred to as "Planinvest"), a Luxemburg corporation owned and controlled by her, and to obtain money and property from them by means of false and fraudulent pretences, representations and promises. Specifically, the fraudulent scheme charged consisted of causing title of two different parcels of real property in Montreal, Canada, to be transferred to Planinvest, one on January 11, 1968 for $778,500. and the other on February 5, 1968 for $361,500., through the vehicle of two prior existing Bahamian corporations, Columbia Corporation, Ltd. and Splindian Investments, Ltd. Title to both parcels was allegedly conveyed in the Bahamas branch office at the First National City Bank in Nassau, Bahamas, at inflated prices, the claim being that the real estate was worth less than one-tenth of the sales price.

Petitioner Frank is an attorney with an office in Washington, D. C. He was formerly a special agent of the F.B.I. and the C.I.A. Frank's contact with the main prosecution witness resulted from security services previously provided her father, General Trujillo, on his visits to the United States. After the General was assassinated in 1961, Mrs. Dominguez enlisted Frank's aid in escaping from her husband in Madrid so that she could enter the United States with her children. Because of an expropriation decree of the Dominican Republic which divested

her and her family of all property accumulated while her father was dictator in the Dominican Republic, because of lawsuits against her by illegitimate heirs of her father and because of fear of retaliation by her husband, she concealed most of her vast assets in foreign corporations in foreign countries where disclosure of the real owner was kept secret, and she moved from hotel to hotel to conceal her whereabouts. One of these foreign corporations, Planinvest, of which she was the sole owner and of which she had sole authority to sign checks was the company that made the purchases of the Canadian property at issue.

In May, 1969, prior to the indictment herein, Mrs. Dominguez had instituted a civil action for damages in the United States District Court, Southern District of New York, in the name of Planinvest against petitioner and the other defendants based on the same transactions and charges of fraud as later charged in the present indictment. That action is still pending and it is with reference to that pending charge that the Court of Appeals below found error in the trial court's instruction to the jury which it nevertheless deemed harmless, to which reference is made hereinafter.

The testimony of Mrs. Dominguez, principal witness on whom the prosecution relied, as to the other witnesses, has been set forth in the opinion of the Court below annexed hereto, although petitioner Frank challenges some of the unwarranted inferences which the Court of Appeals says the jury was permitted to draw against him because Frank did not take the stand to testify in his own defense.*

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* "A—a" references are to Petitioner's Appendix to the brief filed with the Court of Appeals.

Reasons for Granting the Writ

1. The Court of Appeals approves petitioner's guilt by a constitutional impermissible standard of allowing inferences from the prosecution evidence to be drawn by the jury from petitioner's failure to testify as a witness.

In reviewing the testimony of the witnesses for the prosecution and in determining what permissible inferences a jury may draw from such testimony, the Court of Appeals has held that since petitioner Frank did not testify or offer any evidence, the jury was permitted to draw inferences from said testimony that it would otherwise be impermissible to draw had he testified. The Court held:

> "When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version." (Slip Op. at 1896-1897).

From the Government's proof of the fact that Frank knew after Planinvest had purchased the two parcels that the purchase price had been greater than the amount authorized by Mrs. Dominguez, which would of course have been insufficient standing alone to convict him of these charges (*Nye & Nissen* v. *United States,* 336 U.S. 613, 69 S. Ct. 766), the Court of Appeals' decision immensely broadens the scope of permissible inferences which the jury may draw from that fact—i.e., that he had a hand in getting Mrs. Dominguez to sign the checks, had a hand in transporting them to the Bahamas and back to New York had a hand in the closing of title on the Bahamas, and walked away from the First National City Bank in the Bahamas with $300,000. to $600,000. of the Planinvest

money without any evidence to support such impermissible inferences.

In sanctioning such impermissible inferences the Court of Appeals rejects the fundamental concept that a jury may not draw any unfavorable inference from the defendant's failure to take the stand, which is embodied in the Fifth Amendment privilege against self-incrimination and which was specifically protected by Congressional enactment in 18 U.S.C. §3481. See *Stewart* v. *United States,* 366 U.S. 1, 81 S. Ct. 941 (1961). Under that Act a defendant's failure to testify in his own defense "shall not create any presumption against him." In *Griffin* v. *California,* 380 U.S. 609, 85 S. Ct. 1229 (1965), this Court concluded that any adverse inference from a defendant's failure to testify, whether made by a prosecutor or a judge was constitutionally impermissible. The same prohibition exists with even greated force with respect to any adverse factual inference to be drawn by a jury, a principle which the Court of Appeals opinion rejects.

If, as the Court of Appeals maintains, it was proper for the jury to draw such material inferences from the prosecutor's evidence where the petitioner remained silent, such a proposition departs from numerous decisions of this Court that the invocation of the Fifth Amendment privilege against self-incrimination permits no adverse inferences against the one who invokes it. *Grunewald* v. *United States,* 353 U.S. 391, 421, 77 S. Ct. 963, 982 (1957); *Griffin* v. *California,* 380 U.S. 609, 85 S. Ct. 1229 (1965).

Equally if not more significant is that the logical extension of the opinion of the Court of Appeals is to invite trial courts to instruct juries that they can draw such inferences from the defendant's failure to testify

in evaluating the prosecution's evidence in meeting its burden of proof, a principle this Court denounced in *Chapman* v. *State of California,* 386 U.S. 18, 87 S. Ct. 824 (1967), *rehg den.* 386 U.S. 987, 87 S. Ct. 1283 (1967). Indeed, this pronouncement of the Court of Appeals goes much further than the jury instruction condemned in *Chapman* v. *State of California, supra,* where the trial Court permitted the jury to draw an inference that the evidence unfavorable to the defendant was more probable as a result of the defendant's failure to take the stand. *Chapman* v. *State of California,* 386 U.S. at 19, n. 2, 8 S. Ct. at 825, n. 2. Here, the Court of Appeals proposes that such adverse inferences can be drawn by the jury even though no evidence exists in the record below, solely because the defendant chooses not to testify.

It is respectfully submitted that this unconstitutional and unwarranted proposition of law permeates the Court of Appeals' reasoning on four other substantial questions of law, in two of which error was found but considered harmless by the Court of Appeals.

2. The Court of Appeals applied a standard for harmless error to sustain petitioner's conviction which was contrary to prior decisions of this Court.

In a case such as this where the prosecution depended primarily on one witness, Mrs. Dominguez, whose motives to lie and fabricate evidence became a substantial issue in view of her pending lawsuit for $1,500.000. against petitioner Frank and his co-defendants based on the same transactions and claim of fraud as was charged against petitioner and his co-defendants in the criminal case, the harmless error rule, it is submitted, was improperly applied contrary to this Court's decisions in *Kotteakos* v.

United States, 328 U.S. 750, 761-765 (1946), and *Chapman* v. *State of California,* 386 U.S. at 18, 22, 87 S. Ct. at 824, 827 (1967).

(a) The Interpreter Point

Because Mrs. Dominguez was the main witness for the prosecution, any material restriction on the right to cross-examine her could scarcely be considered harmless error if there was "a reasonable possibility that [such a restriction] might have contributed to the conviction." *Chapman* v. *State of California,* 386 U.S. at 23, quoting from *Fahy* v. *State of Connecticut,* 375 U.S. 85, 86-87, 84 S. Ct. 229, 230 (1963). The Sixth Amendment right of any defendant to be confronted with the witness against him "include[s] the right to cross-examine those witnesses," a right which "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *State of Texas,* 380 U.S. 400, 401, 405, 85 S. Ct. 1065, 1066, 1068 (1965). Where the error is of constitutional proportions which exist if, as petitioner Frank contends, his cross-examination of Mrs. Dominguez was unduly restricted, such error to be harmless requires the Court of Appeals "to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. at 24, 87 S. Ct. at 828. The Court of Appeals made no such finding although it noted that "we are not altogether happy about the manner in which this matter was handled by the trial court" (Slip Op. at 1904). Indeed, said the Court of Appeals:

> "We are disturbed by her [Mrs. Dominguez] occasional resort to the interpreter when a cross-examiner seemed to approach at least a minor success." (Idem at 1905).

Although the Court of Appeals sought to diminish the extent of such an abuse by characterizing it as "occasional" and the resort to the interpreter only where it seemed that the cross-examiner had achieved a "minor success", petitioner had submitted to the Court of Appeals fifteen instances where the interpreter was improperly utilized on the cross-examination (petitioner Frank's main brief in the Court of Appeals, p. 35). Six of these fifteen instances were specifically enumerated where the cross-examiner was severely taxing Mrs. Dominguez as to the truth of her direct testimony in substantial matters but where in each instance she frustrated the cross-examiner by resorting to the interpreter contrary to the instructions of the trial court and under circumstances where she had been found by the trial court to understand English sufficiently to answer without the interpreter. Such instances were set forth in petitioner's main brief in the Court of Appeals (pp. 37-43).

This calculated destruction of petitioner's right of cross-examination is best illustrated by the reference in *Wigmore on Evidence* (Vol. III, §811, p. 277) to an early English case:

> "O'Brien, J., in *R. V. Burke,* 8 Cox Crim. Cas. 45, 47 (1858): The value of this test [cross-examination] is very much lessened in the case of a witness, having a sufficient knowledge of the English language to understand the questions put by counsel, pretending ignorance of it, and gaining time to consider his answers while the interpreter is going through the useless task of interpreting the question which the witness already understands."

The record reveals that Mrs. Dominguez did just that. The trial court, having found that the witness understood English well enough to testify without an interpreter on

direct-examination was under a duty to deny her the use of an interpreter on cross-examination. *Pietrzak* v. *United States,* 188 F.2d 418, 420 (5th Cir. 1951); *Wigmore on Evidence* (Vol. III, §811, p. 277). The Court of Appeals' refusal to reverse the conviction because of this error completely disregards the proper rule announced by these other authorities and the admonition of this Court in *Pointer* v. *State of Texas*:

> "The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is '[o]ne of the fundamental guaranties of life and liberty,' and 'one of the safeguards essential to a fair trial.' It is, I think, as indispensable an ingredient as the 'right to be tried in a courtroom presided over by a judge.' Indeed, this Court has said so this very Term. Turner v. State of Louisiana, 379 U.S. 466, 472-473, 85 S.Ct. 546, 549-550, 13 L.Ed.2d 424. (380 U.S. at 410, 85 S.Ct. at 1071)

Such an error of the trial court which the Court of Appeals said was not sufficiently prejudicial (Slip op. at 1906) was scarcely the equivalent of a finding that "it was harmless beyond a reasonable doubt".

Furthermore, in finding no prejudice requiring a reversal the Court of Appeals completely overlooked and failed to consider or mention the additional failure of the trial court to qualify the interpreter. The interpreter was sworn but the trial court did not qualify her as to her skill, knowledge and experience which it was required to do. *Wigmore on Evidence* (Vol. II, §560, p. 640, and cases cited). Not only is the interpreter's skill, experience and knowledge a prerequisite for qualification, but also qualification serves to determine whether bias or close relationship to the witness or to the prosecution exists, all of which are important considerations in the trial court's

determination as to the propriety and use of the particular interpreter selected. See, *e.g., United States* v. *Addonizio,* 451 F.2d 49, 68 (3d Cir. 1971), *cert. denied* 405 U.S. 936 (1972). This oversight was called to the attention of the Court of Appeals in the petition for rehearing to no avail (Petition for Rehearing, pp. 12-13).

(b) The error found to be harmless in the trial court's instruction to the jury that a conviction in this case would have no impact upon Mrs. Dominguez' pending civil action against petitioner Frank and the other co-defendants

The Court of Appeals found that the trial court erred in charging the jury that a conviction in this case would not affect the civil action brought by Mrs. Dominguez against petitioner Frank and the other defendants on the same transactions because the two proceedings were completely unrelated and that even "if the defendants are convicted in the criminal action, the plaintiffs in the civil suit will have to prove their entire case for damages before a new jury and a judge and could in no way rely upon defendants' prior conviction to sustain their claim." The Court of Appeals held that this instruction, as a matter of law, was totally inaccurate. The Court of Appeals held, however, that the instruction was harmless because of "our conviction '. . . that the error did not influence the jury or had but very slight effect' ", quoting from this Court's opinion in *Kotteakos* v. *United States,* 328 U.S. at 764.

Whether the error was of constitutional proportions as petitioner maintains it was in the interpreter point previously discussed, or was an error which was found to exist according to the procedure and standards appropriate for criminal trials, the test of harmless error to be

applied must be considered from the accumulation of errors rather than on each error separately. The denial of petitioner Frank's right to proper cross-examination of the main Government witness, Mrs. Dominguez, through her improper use of the interpreter prevented petitioner Frank from truly testing the most important evidence of the prosecution which came from her testimony. The trial court in its erroneous instruction to the jury that the criminal conviction would have no impact on her civil suit further supported her credibility and lack of motive to lie in complete contradiction of petitioner Frank's contention that in appraising her credibility it was important for the jury to consider that she was using her testimony in this criminal case for her civil suit and that if she wins in the criminal action, it means she will win in her civil suit (A 163a, 812a). For the Court of Appeals to conclude that the erroneous charge did not influence the jury or had but very slight effect is to completely disregard what this Court has noted on numerous occasions to the contrary that:

> "'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626, 14 S. Ct. 919, 923, 38 L. Ed. 841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States,* 326 U.S. 607, 612, 66 S. Ct. 402, 406 (1946).

Indeed, in reversing the conviction in *Bollenbach* v. *United States, supra,* this Court concluded in terms which singularly apply to the instant situation:

> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of

those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C. § 391, 28 U.S.C.A. § 391. All law is technical if viewed solely from concern for punishing crime without heading the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale L.J. 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. Bruno v. United States, 308 U.S. 287, 293, 294, 60 S. Ct. 198, 200, 84 L. Ed. 257; Weiler v. United States, 323 U.S. 606, 611, 65 S. Ct. 548, 551, 156 A.L.R. 496. From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilty by a jury under appropriate judicial guidance, however cumbersome that process may be." 326 U.S. at 614-615, 66 S. Ct. at 406.

3. The Court of Appeals has approved conduct of the prosecutor and the trial Judge in deliberately disobeying an order of a high Bahamian Court which flouts principles of propriety and international comity

The Court of Appeals' opinion acknowledges that "the Government's case rested heavily on the testimony of . . ." two former employees of the First National City Bank, Nassau, Bahamas, Branch (Mr. Latvis and Miss Reilly), one of whom was at the time of the trial still employed by the First National City Bank in a branch in New York (Slip Op. at 1902). The Court of Appeals' opinion further acknowledges that Bahamian law expressly prohibited disclosure of "any information relating to the affairs of a bank or of the customers of a bank which [a person] has acquired in the performance of his duties or the exercise of his functions", and that both Latvis and Reilly acquired the information about which they testified during the performance of their banking duties in the Bahamas. Such disclosure by any person was a criminal offense subject to punishment by "a fine not exceeding one thousand pounds or to a term of imprisonment not exceeding one year or to both such fine and imprisonment." Banks of Bahamas Amendment Act, §19(2)

Indeed, the prosecution conceded that Bahamian law prohibited disclosure of the information to which Latvis and Reilly testified unless sanctioned by a Bahamian court by instituting judicial proceedings in the Bahamas and hiring Bahamian counsel to attempt to obtain the information legally. The trial court authorized a request by the prosecution for international judicial assistance seeking pertinent records of the First National City Bank in the Bahamas and for the testimony from the proper officers of the First National City Bank there with respect to those transactions when the First National City Bank in New York declined to produce such records and the testi-

mony of these bank officers on the ground that it "would be a criminal violation of the laws of the Bahamas . . ." (A 54a).

As the Court of Appeals opinion notes, a Justice of the Bahamian Court granted the prosecution's request "but his order was stayed pending an appeal . . . (Slip Op. at 1903). Having failed to obtain the necessary approval from the Bahamian court, the prosecution again urged the trial court as late as one day before the instant trial to compel First National City Bank, New York, to produce the records and testimony previously requested. The Government's application was denied by the trial court, as follows:

> "All right. Now, since the order [of the Bahamian Court] which is before me now plainly says that the bank is not at liberty to disclose the documents until further order of the [Bahamian] Court by reason of Section 19 of the Banks Act, is there anything that I can do at this point, Mr. MacDonald, other than to defer a ruling on this matter pending listing of that order if any?"

The trial court further stated:

> "I am not sure that it would be seemly for a United States Court to get into a tug of war with the Commonwealth of the Bahamas Supreme Court. Here is an order [of the Bahamian Court] made which directs the bank to refrain from a particular course of action, until further order of the Court and in deference to that order it seems to me that I should defer making any ruling in this matter."

The stay order of the higher Bahamian court to which the trial court referred prohibited the First National City

Bank from disclosing its records and prohibited any of its bank employees from giving any testimony with respect thereto (Appellee's Appendix, 184b-185b, Petr's. Reply Brief pp. 4-5). The power of the Bahamian court to issue such a stay order was neither attacked by the prosecution in the Court of Appeals below nor did it attack the general rule that ". . . the power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket . . ." *Landis* v. *North American Co.*, 299 U.S. 248, 255, 57 S. Ct. 163, 166 (1936). Indeed, the stay order resulted from Bahamian judicial proceedings initiated by the prosecution itself.

Despite what had occurred, the trial court over objection by petitioner permitted the prosecution to violate this order of a higher Bahamian court and to permit Latvis and Reilly to testify to the very transactions prohibited. The Court of Appeals approved this action by the prosecution and the trial court on the ground that:

> "no principle of accommodation requires the United States to seal the lips of American citizens testifying to facts within their knowledge concerning activities of other Americans in a foreign country as part of a scheme to violate American criminal law, simply because that country chooses to throw a veil of secrecy around bank accounts except insofar as their courts may see fit to lift it." (Slip Op. at 1903).

This holding, it is submitted, is a violation of the principles of international judicial comity which our courts dedicated to the enforcement of our laws should not permit or countenance. Aside from the clash of sovereignties which occurred and which the Court of Appeals sanctions, the Court of Appeals also places a stamp of approval

upon unseemly and improper actions of the prosecution in deliberately violating an order of a higher Bahamian court when the prosecution itself on order of the trial court had submitted to the jurisdiction of the Bahamian court by a request for the relief which was stayed. What the Court of Appeals has sanctioned by its opinion in this case was a flagrant violation of the laws of a friendly neighbor and a circumvention of its own procedures. The proper rule, we respectfully submit, is what the Court of Appeals had previously indicated in *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962), where it noted:

> "Such a [circumvention] scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state. Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries." 297 F.2d at 619.

4. The Court of Appeals adopts a broad construction of the fictitious name statute (§1342) beyond what was intended by Congress and contrary to well-established principles of strict construction of criminal statutes long adopted by this Court

One of the objects of the conspiracy charged in paragraph 3 of Count 1 of the indictment recited that the petitioner and the other defendants for the purpose of promoting said scheme and artifice through the use of the mails, "would use, assume, and request to be addressed by fictitious, false and assumed titles, name, and

addresses other than their own proper names" (Appendix, A 17a). Said fictitious, false and assumed titles and names were described in Counts 6 and 7 which were the substantive counterparts of the object of the conspiracy above quoted. These names were Columbia Corp., Ltd., Herbert M. Lefkowitz, Anthony C. Hepburn, and Celia E. Neill, described in Counts 6, and the same three individual names but instead of Columbia the name Splindian Investments, Ltd. in Count 7. The Court of Appeals notes in its opinion that Hepburn was a Bahamian attorney, vice-president of Columbia Corp., Ltd., and Splindian Investments, Ltd., and his secretary Celia Neill was assistant secretary of these corporations, both of whom signed the deeds transferring the property from both corporations to Planinvest (Slip Op. at 1888, 1892). Herbert M. Lefkowitz, the Court of Appeals indicated represented Planinvest at the closing in the Bahamas (Slip Op. at 1889, 1892). Both Columbia and Splindian were existing legal corporations formed in the Bahamas.

The Court of Appeals deplored the use of the fictitious name statute on a mail fraud case, particularly where there was a conspiracy charged under 18 U.S.C. §1341. The Court of Appeals believed that if it was erroneously invoked it would lead not only to a reversal of Counts 6 and 7 but perhaps also to a reversal of Count 1, the conspiracy charge, "since the Judge had instructed that a finding of conspiracy to violate §1342 would warrant a conviction on the conspiracy count." (Slip Op. at 1898). The prosecution conceded, noted the Court of Appeals, that "there was no evidence that any participant used or assumed or requested to be addressed by any fictitious, false or assumed name." (Slip Op. at 1898). Moreover, Hepburn and Neill were identified by the prosecution witnesses and conceded by the prosecution to be real and

live persons who personally in their own names effectuated the real estate transactions in behalf of Columbia and Splindian, and the same was true as to Lefkowitz who in person in his own name accepted the transfers of the real property for Planinvest and about whom the Court of Appeals noted there was insufficient evidence to indicate this was not Lefkowitz' real name (Slip Op. at 1898 n. 13).

Thus, the prosecution conceded and the Court of Appeals so found that (1) three of the five names involved in the real estate transactions were individuals using their own names and acting in their true legal capacities which the trial court had instructed the jury would not prevent a verdict of guilt (Appendix A 918a), and (2) there was no evidence that petitioner Frank and the other defendants "did use and assume and request to be addressed by a fictitious, false and assumed title, name and address . . .", which is the identical language employed in 18 U.S.C. §1342 and in paragraph 3 of Count 1 and Counts 6 and 7 of the indictment.

The prosecution's argument which the Court of Appeals adopted is that the statute is violated even though the names charged as fictitious, false and assumed were not fictitious, false and assumed persons but actual persons if in fact those names were used to conceal the identities of the perpetrators of the fraud. In so holding, the Court of Appeals agreed with the prosecution that the statute should not be narrowly construed but broadened to include "true beneficiaries of the scheme, even though the individuals and corporations are using their actual names." (Slip Op. at 1898).

The Court of Appeals did not cite any specific congressional authority or case law for its conclusion. The

Court of Appeals analogized to situations involving fraudulent misuse of credit cards which it says "typically involved the use of names of real persons" citing, for example, one of its own opinions in *United States* v. *Chason,* 451 F.2d 301 (1971), *cert. denied* 405 U.S. 1016 (1972) (Slip Op. at 1899, n. 14). In *Chason,* however, the indictment charged a violation under Section 1341, not Section 1342. Moreover, the Court of Appeals opinion conflicts with *Tingle* v. *United States,* 87 Fed. 320, 323 (5th Cir. 1898), where the Fifth Circuit, dealing with a predecessor section of 1341 held that an indictment would not lie which charged the carrying out of a scheme or artifice through the mails by the use of a fictitious false or assumed name if the name charged as having been used, Otho Aronson, was a real person. Such a construction of the language in the statute by the Fifth Circuit in *Tingle* v. *United States, supra,* is more reasonable and is in accord with the generally accepted definition of a "fictitious name". See, *e.g., Black's Law Dictionary*:

> "Fictitious name. A counterfeit, feigned, or pretended name taken by a person, differing in some essential particular from his true name * * * with the implication that it is meant to deceive or mislead."

More significant, however, is that the Court of Appeals in so construing the language of Section 1342 has disregarded several vital principles of construction of criminal statutes, time-honored and often expressed by this Court:

> "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of leniety." *Rewis* v. *United States,* 401 U.S. 808, 812, 91 S. Ct. 1056, 1059 (1971).

This principle cited by this Court in *United States* v. *Bass*, 404 U.S. 336, 346, 92 S. Ct. 515, 522-523 (1971), was founded on two policies:

> "First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible, the line should be clear.'"

and

> "Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."

The same principles were recently reaffirmed by this Court as late as 1973 in *United States* v. *Enmons*, —— U.S. ——, 93 S. Ct. 1007, 1015.

The opinion of the Court of Appeals, it is submitted, does the reverse. It construes Section 1342 in a broad and unwarranted manner to include in its ambit conduct that was neither intended nor foreseen or proscribed.

5. Petitioner's convictions on the mail fraud counts cannot stand because the mailings that occurred were incidental to and after the alleged scheme and artifice had been accomplished

With respect to the charge under 18 U.S.C. §1342 (the fictitious name statute) set forth in Counts 6 and 7 and also charged as an object of the conspiracy in paragraph 3 of Count 1, the crimes were complete when the real estate was transferred in the Bahamas. Proof was

neither shown of the use of the mails to promote the scheme charged nor was the use of fictitious names employed by means of the postal service. The only mailing occurred subsequent to the transfer of the real estate from Columbia Corp., Ltd. to Planinvest when on January 15th "Hoffer sent Solomon a copy of Columbia's charter, saying it had been incorporated on November 27, 1967" (Slip Op. at 1890). Thus, the convictions on Counts 6 and 7 and on Count 1 cannot stand in view of this Court's decision in *United States* v. *Maze,* —— U.S. ——, 92 S. Ct. 645 (1974); see also *Bollenbach* v. *United States,* 326 U.S. 607, 66 S. Ct. 402 (1946).

CONCLUSION

For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS BENDER
Attorney for Petitioner
John Joseph Frank

LOUIS BENDER,
SANDOR FRANKEL,
Of Counsel.

APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 578-581—September Term, 1973.

(Argued December 20, 1973 Decided February 25, 1974.)

Docket Nos. 73-2384
73-2425
73-2495
73-2408

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, and STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman,

Defendants-Appellants.

Before:

FRIENDLY, HAYS and OAKES,
Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Milton Pollack, *Judge,*

convicting defendants, after a verdict, of conspiracy, various substantive offenses under the mail fraud statutes, 18 U.S.C. §§ 1341-43, and interstate or foreign transportation of stolen money, 18 U.S.C. § 2314. Affirmed.

W. CULLEN MACDONALD, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, and S. Andrew Schaffer, Assistant United States Attorney, of Counsel), *for Appellee.*

LOUIS BENDER, ESQ., New York, N. Y., *for Appellant Frank.*

ARTHUR KARGER, ESQ., New York, N. Y., *for Appellant Hemlock.*

HERALD PRICE FAHRINGER, ESQ., Buffalo, N. Y., *for Appellant Hoffer.*

JOHN M. MCGILLICUDDY, ESQ., New York, N. Y. *for Appellant Borgman.*

FRIENDLY, *Circuit Judge*:

Count 1 of this indictment in the District Court for the Southern District of New York charged the four appellants[1] with conspiring, 18 U.S.C. § 371, to violate the statutes relating to mail fraud, 18 U.S.C. § 1341-43, and interstate or foreign transportation of stolen money, 18 U.S.C. § 2314. Counts 2 through 5 charged appellants with the substantive offense of interstate or foreign transportation of two certified checks in violation of § 2314. Counts 6

[1] The indictment also named as so-conspirators A. Arthur Kay and Maurice S. Hebert, who are unarrested fugatives.

and 7 charged them with violating 18 U.S.C. § 1342 by using fictitious names in carrying out a scheme to defraud by mail. Counts 8 through 16 charged them with unlawful use of mail and wire communication facilities in violation of § 1341 and § 1343.[2] The jury returned guilty verdicts against all appellants on the conspiracy and fictitious name counts. Frank Hemlock and Hoffer were found guilty on the unlawful transportation counts. Hemlock and Hoffer were found guilty on two of the mail fraud counts. The jury acquitted on the remaining counts. The judge imposed substantial prison sentences on all defendants and a $10,000 fine on Hemlock.

I. *The Facts*

The case concerns a fraud allegedly perpetrated on Mrs. Marie Dominguez, the then 28-year-old daughter of former President Rafael Trujillo of the Dominican Republic. Since appellants all challenge the sufficiency of the evidence to warrant submission to the jury, it is necessary to summarize the evidence presented against each defendant. Taken in a light favorable to the Government the facts are as follows:

In the summer of 1967, Mrs. DeLeon, as Mrs. Dominguez then was, left her husband's home in Madrid and came to this country with two of her children. Apparently because her property was the subject of confiscation decrees by the Dominican government, she had placed it in the name of a number of corporations in countries

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[2] Judge Pollack did not submit counts eight, eleven and sixteen to the jury but dismissed them at the close of the Government's case.

with bank secrecy laws. One of these, a Luxembourg corporation called Planinvest, held a $2.4 million certificate of deposit in the London offices of the Bank of London and South America.

When she arrived in this country, Mrs. Dominguez was met at the airport by defendant John Joseph Frank, an attorney with an office in Washington, D.C., and a former agent with the F.B.I. and the C.I.A. Mrs. Dominguez' husband had engaged Frank to obtain an entry visa for her, apparently because he had provided security services for the Trujillo family in the past. Frank was accompanied by defendant Borgman, whom he introduced as "Steve Miller", the name we shall also use.

Shortly thereafter, Frank and Miller introduced Mrs. Dominguez to defendant Hemlock, a New York attorney with whom defendant Hoffer was associated. Hemlock agreed to participate in a ruse for the benefit of Mrs. Dominguez whereby, under the pretext of a business negotiation, he would divert her previous husband, Mr. DeLeon, from Madrid to Barcelona, while she took possession of certain of her belongings in the family home in Madrid. The plan succeeded. In September Hemlock and Hoffer began to advise Mrs. Dominguez on a property settlement with her husband, from whom, with the aid of Frank and Miller, she had obtained a Mexican divorce. In the course of this, they learned of Planinvest. Hemlock and Mrs. Dominguez instructed the London bank to transmit interest payments to her personal account at the Bank of New York and to send all communications relating to the Planinvest account "in care of Hemlock, List, Hoffer & Becker, Esqs." at their New York office. In October, on the advice of Frank and Miller, she opened a second

account, at the New York branch of the Bank of London and South America. That account was opened in the name of Planinvest, "c/o John J. Frank, 1500 Massachusetts Avenue, Washington, D.C." Mrs. Dominguez signed one signature card for the account, and Frank and Miller signed a second card to enable them to request statements, deposit slips, checks or a balance relating to the account.[3] During the fall of 1967, Frank and Miller largely took over the conduct of Mrs. Dominguez' day-to-day financial affairs. They had custody of her checkbook, they prepared batches of checks for her signature, and they cashed checks for her at the banks.

Sometime during that fall, Frank and Miller began to recommend that Mrs. Dominguez invest in foreign land, avowedly to avoid loss in the devaluation of the dollar—advice that proved to be wise, although premature—and to avoid high United States taxes. After an adverse reaction from Mrs. Dominguez' brother, Frank and Miller returned to the charge with a recommendation specifically suggesting that she buy Canadian land. According to Mrs. Dominguez, Miller insisted that Canada was booming and that a land purchase there "would be a wonderful investment." Mrs. Dominguez agreed to consider any specific property that they might suggest, but specified that in no event was she willing to spend more than $200,000.

Mrs. Dominguez' limited acquiescence provided an entry for the Canadian land manipulations through which the fraud was sprung. On January 9, 1968, a Dr. George C. Hori sold a parcel of land in the northeastern part of

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[3] On the Government's theory of the case this account served no purpose save as a vehicle for subsequent frauds.

Montreal. The price of the land was $79,000, of which $22,000 was to be paid him in cash and the balance was to be used to clear existing mortgages. The deed executed in the office of a notary, Maitre Elie Solomon, named as the purchaser A. Arthur Kay, one of the two unarrested co-defendants named in the indictment. The parties instructed the notary to hold the deed pending payment into his trust account for disbursement to Dr. Hori and the mortgagees. The notary asked Kay for the names of the Bahamian company to which Kay was planning to resell the land and of the European company to which it would be resold again; Kay said the information would come in a call from New York. Several hours later, Mtre. Solomon received such a call; he was not sure whether it was from Hoffer or Hemlock.[4] The caller said the first name of the Bahamian corporation was "Columbia"; the rest of the information would be supplied the next day in the Bahamas. The notary in turn requested that the caller procure a resolution from the ultimate purchaser authorizing the purchase. He dictated a proposed resolution that would meet the requirements for effecting the transfer.

On January 10, Mtre. Solomon, Kay, co-defendant Maurice S. Hebert, and an attorney, Irving L. Adessky, flew from Montreal to Kennedy Airport in New York City. At

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[4] Solomon testified on direct examination that the call from New York had come from "a gentleman who identified himself as Mr. Harry Hoffer." The court subsequently struck out his direct testimony concerning the telephone call for lack of foundation, but counsel for Hoffer on cross-examination elecited from Solomon that before the grand jury he had testified he had received a call from "either Mr. Hemlock or a member of his firm."

the same time Miller had the New York branch of the Bank of London and South America certify a Planinvest check for $778,500 to Columbia Corporation Ltd.[5] Hemlock, inferably with the check in hand, joined the Montreal party at the airport, whence they flew to the Bahamas, where Hoffer was awaiting them.

The next day the entire group met with a Bahamian attorney, Anthony Hepburn, and his secretary Celia Neill. Kay signed a deed transferring the property to Columbia, which was represented by Hepburn and Neill, its vice-president and assistant secretary. The further transfer from Columbia to Planinvest was delayed because neither Hemlock nor Hoffer had brought a Planinvest resolution authorizing anyone to execute the deed of purchase. While the group was waiting for the arrival of the resolution, Hoffer, in Hemlocks' presence, informed Mtre. Solomon that Planinvest would be represented by one Herbert M. Leftkowitz as agent but that the deed should refer to Planinvest in care of Frank at his Washington, D.C. office; Hoffer also promised to send Solomon certified copies of the charters of Columbia and Planinvest.

A man identified as Lefkowitz appeared at around 1:30 p.m. He produced a resolution which the notary said was substantially what he had dictated to either Hoffer or Hemlock in their telephone conversation two days before.

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[5] The check is signed in the name of Angelita De Leon (the name Mrs. Dominguez used during her first marriage), as President of Planinvest; the Government did not dispute that the signature was hers. The basis for the certification was a telexed tranfer of $780,000 from the main office in London. The record is silent on who directed the transfer.

Appendix A

The resolution recited that at a meeting in New York on January 9, Planinvest had authorized the purchase of the property from Columbia for $1.00 and other good and valuable consideration and had designated Lefkowitz to sign the deed, the document purported to be certified by Mrs. DeLeon as President and Secretary. The notary thereupon authorized execution of the deed from Columbia to Planinvest. However, since he had not received the $79,000 required to clear the initial transaction, the notary refused to release the certified copy of the deed from Columbia to Planinvest. The meeting then adjourned pending the arrival of the funds.

During the same day, January 11, Hemlock and Hoffer met with the Nassau branch manager of the First National City Bank (FNCB), Michael Latvis. They opened accounts for Columbia and for Splindian Investments Limited, another Bahamian corporation. The accounts provided that withdrawals could be made only with the authorization of Hemlock, Hoffer and Frank. Hemlock and Hoffer signed the signature card at that time; Frank's signature was obtained later. Hemlock and Hoffer then presented the $778,500 check from Planinvest to Columbia and arranged for a portion of this to be kept in a time deposit.[6] Notwithstanding the certification, FNCB would not extend immediate credit until the check had been accepted for clearance at the Federal Reserve Bank at New York, a procedure which would normally take eight days. Hoffer and Hemlock suggested the dispatch of a messenger to expedite clearance of the check. Latvis' secre-

[6] Latvis testified that time deposits were available on a 30- and 90-day basis and that to the best of his memory, the deposits in question were placed on a 90-day basis.

tary, Miss Elizabeth Reilly, volunteered for the trip, for which Hoffer and Hemlock made the arrangements.

Miss Reilly presented the check for processing at FNCB in New York around 10:30 a.m. on July 12. That same morning Hemlock, Hoffer, Kay and Hebert met with the notary and Adessky in Nassau; either Hemlock or Hoffer gave Adessky and the notary $500 apiece as compensation for their services. The two lawyers then left for New York. Later Kay took the notary to the Nassau branch of FNCB, where the transfer of $79,000 to the notary's trust account in Montreal was arranged. The notary flew the next day to New York; by prearrangement Hoffer met him at the airport and received a "special copy" of the deed from Columbia to Planinvest.[7] On January 15 Hoffer sent Solomon a copy of Columbia's charter, showing it had been incorporated on November 27, 1967.

Shortly thereafter, Miller told Mrs. Dominguez she had purchased land in Canada. After she protested that she had authorized only inquiry and not action, Frank came into the room. Miller asked if she remembered signing "the check"; she did not. Frank then advised her not to worry and assured her that "everything is all right." In answer to a question concerning the cost of the property, he answered that it was "within the limits" she had previously set. Sometime later, Miller showed her some clippings from U.S. News & World Report and the Wall Street Journal that reported new mineral explorations in various parts of Quebec. Miller told her that the discoveries had already caused her tract of marshy, swampy land near Montreal to appreciate.

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[7] The "special copy" differed from the deed that was delivered in that it did not contain a copy of the resolution but merely referred to a duly authorized resolution.

Appendix A

About a week after the first transaction, Kay inquired whether the notary would be interested in arranging for the sale of some 150,000 square feet of a farm owned by a corporation in which the notary held a minority interest, for no more than $8,000. When Solomon expressed reluctance to proceed with the transaction before hearing from Hemlock or Hoffer, Kay paid him $500 to cover the notarial fees and the preliminary costs of subdivision. The notary thereupon began making arrangements for the sale.

Kay subsequently told the notary that the scenario for the second transaction would resemble that for the first, save for a few changes in names. This time Denise Comeau would take Kay's place as the first purchaser and Splindian, whose charter he delivered to the notary, would be the second. Meanwhile, Mtre. Solomon received a copy of the Planinvest charter from Hoffer; he was disturbed to discover that Planinvest was not expressly empowered to buy and sell land as required by Canadian law, and asked for a copy of the Luxembourg laws that might aid in implying the requisite power. Hoffer never supplied the Luxembourg statutes or any other proof that Planinvest could engage in Canadian real estate transactions.

Miller told Mrs. Dominguez around this time that a very good piece of land in Canada was being sold for tax reasons at less than its worth. She at first demurred, saying that she was unwilling to buy any more land in Canada. Miller then telephoned Frank in her presence and said, "John, she doesn't want to buy the land." After that conversation, Miller once again urged her to consent to the purchase. Finally, she agreed to consider the land, but she insisted that Miller first send a letter to the Bank of London and South America requesting three

different bank appraisals. Miller typed the letter as instructed, but Mrs. Dominguez testified that she never received any response from the bank.

On February 2, 1968 Miller presented to the New York branch of the Bank of London and South America a Planinvest check in favor of Splindian in the sum of $361,500, which the bank certified in consequence of a prior transfer of that sum from London. Two days later the notary Adessky, Kay and Denise Comeau flew to New York. Hemlock joined them, inferably with the certified check in hand, and the group flew on to Nassau where Hoffer was awaiting them.

The following morning the group met with Hepburn, Miss Neill and Lefkowitz for the second closing. The deeds from Solomon's corporation to Miss Comeau and from her to Splindian, acting through Hepburn and Neill, were promptly executed. Although Hoffer supplied no evidence that Planinvest was empowered to purchase foreign real estate, as the notary had requested, the deed from Splindian was executed by Hepburn and Neill, and accepted for Planinvest by Lefkowitz. Hemlock and Hoffer went on to the FNCB, made a time deposit in Splindian's account, and arranged for Miss Reilly to make another trip to New York to expedite the clearance of the Planinvest check. Shortly thereafter Kay paid Solomon $10,856 for the land; $2,856 of this was rebated to Kay upon their return to Montreal.

In February or March, 1968, Arcadio Santana, a former family accountant, left the employ of Mrs. Dominguez' former husband and joined her in New York. She asked him to ascertain from Frank and Miller the precise amount of money that Planinvest had spent on the one acquisition of which she was then aware. Apparently Sant-

ana learned that $778,000 had been paid; when Mrs. Dominguez taxed Frank with this, he once again urged her not to worry and assured her that it was "a good piece of land" and that it was worth the price she paid for it. Shortly thereafter, Hemlock, Hoffer and Frank went to the FNCB in Nassau and asked Latvis to break the time deposits and pay them out in cash, which he did. Since the bank records were not available at the trial because of the Bahamian bank secrecy laws, he could testify only that they withdrew "a large amount, perhaps from 300 to $600,000, $300,000 to $600,000." Also during March, 1968, Frank gave Mrs. Dominguez the special copy of the deed to the Hori tract, see note 7; when she asked him to explain the nominal consideration of one dollar, he called in Miller, who told her that such recitations were usual in Canada.

Unsatisfied with Frank's explanation of the large expenditure, Mrs. Dominguez and her new husband met with Hemlock that June at her home in Queens. The couple gave Hemlock the special copy of the deed and requested that he investigate the transaction. Mrs. Dominguez testified that she thought Hoffer was present at that meeting but could not be certain.[8] Further meetings were held through the summer, primarily for the purpose of discussing Mrs. Dominguez' tax returns which were being prepared by a tax specialist recommended by Hemlock and Hoffer. At one meeting Mrs. Dominguez expressed concern about the Canadian property being in the name of Planinvest, which she thought was not supposed to own land directly. Neither Hoffer nor Hemlock revealed

[8] Mrs. Dominguez testified that although she could not recall which of the summer meetings Hoffer attended, she was certain that he had been at most of them.

their previous exposure to this problem or the purchase from Maitre Solomon. As time passed without the receipt of a report on the initial purchase from Hemlock and Hoffer, Mrs. Dominguez dispatched Santana to Montreal. Early in September, 1968, at a meeting attended by Hemlock, Hoffer and others, she told Hemlock she had learned that he had been in Canada several times making arrangements for the purchase of the lot; he replied "I smell a rat" and "I think somebody has been using my name,"[9] but did not reveal what he in fact knew. She also told Hemlock she had been informed that the lot wasn't worth what was paid for it; Hemlock responded by proposing to set up a meeting with Frank and Miller.

This meeting occurred on September 24 at Hemlock's office. Its first phase was attended by Mrs. Dominguez, Frank, Miller and Hemlock.[10] This time Frank and Miller admitted that the land was not worth what had been paid, but they explained that the difference had been used to pay off the C.I.A. because she had been involved in activities to kill one of her father's assassins. Miller and Frank then left. Mr. Dominguez entered and Hemlock repeated what they had said. In the course of the meeting, Hemlock told Mr. and Mrs. Dominguez nothing about the many other circumstances of the two transactions of which he was aware. Subsequently, Mrs. Dominguez obtained other counsel who began a civil action on her behalf in the

[9] The record contains no evidence that Hemlock had made such trips.

[10] Hemlock had endeavored to persuade Mrs. Dominguez to come without her husband. After this failed, he did prevail on the husband to wait outside his office.

Appendix A

District Court for the Southern District of New York against Frank, Miller and Hemlock.

II. *Sufficiency of the Evidence*

Putting aside for the moment defendants' legal attack on the charges relating to the fictitious name statutes, 18 U.S.C. § 1342, we think Frank's and Miller's claims of insufficiency are so palpably devoid of merit as not to warrant extended discussion. They were the instigators of the scheme to expend $1,140,000 of Planinvest's funds for land that had been purchased for a total of $89,000, and one or the other or both participated in every phase of the plot. All this is crowned by their admission at the final meeting with Mrs. Dominguez that, contrary to their prior assertions, the land was not worth what they paid for it.

Hemlock and Hoffer claim that the evidence is consistent with their having simply engaged in professional activities and that any wrongdoing was solely Frank's and Miller's. Hoffer makes the further argument that he was acting in a subordinate capacity and thus was even farther than Hemlock from the odoriferous stream of guilty knowledge. But too many red flags were flying to make these contentions plausible. It is useful to recall Judge Learned Hand's observation that "the cumulation of instances each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." *United States* v. *White,* 124 F.2d 181, 185 (2 Cir. 1941). We repeat also that lawyers cannot "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen," *United Sates* v. *Benjamin,* 328 F.2d 854, 863 (2 Cir.), *cert. denied,* 377 U.S. 953 (1964). See also *United States* v.

Sarantos, 455 F.2d 877, 880-82 (2 Cir. 1972), and cases there cited. If Hemlock and Hoffer were acting as attorneys, their client was Planinvest, which they knew to be simply Mrs. Dominguez in an incorporated form. Yet there is no indication that they ever advised her about the seemingly needless interposition of Columbia and Splindian, that they ever made the slightest inquiry concerning the relationship between the large Planinvest certified checks and the modest price which they knew was paid to the Canadian owners, or that they ever notified Mrs. Dominguez that the second transaction had occurred at all. Perhaps the most damaging evidence against them was their personal participation with Frank in the breaking of the time deposit just after Frank had learned that the jig might be beginning to be up. Whether or not they received any portion of the proceeds, they had beheld Frank walking out of the FNCB in Nassau with $300,000 to $600,000 in cash generated by the Planinvest checks to Columbia and Splindian. Six months later, and three months after Mrs. Dominguez had instructed them to investigate the first transaction, they had revealed nothing. Their silence throughout the summer, in light of their intimate familiarity with many of the details of the two purchases, makes their claim of innocence highly implausible. Hemlock's efforts to prevent Mr. Dominguez from attending the showdown on September 23 and his bland reaction to a revelation by Frank and Miller that would have caused an honest lawyer to erupt in fury are the final straws as far as he is concerned.

In passing on the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none. To be sure, the defendants were not required to testify or to present any case at all, and the jury could not

permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version.[11] The test of sufficiency in criminal cases is "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States,* 160 F.2d 229, 232-33 (D.C. Cir.) (Prettyman, J.), *cert. denied,* 331 U.S. 837 (1947), approved in *United States* v. *Taylor,* 464 F.2d 240, 242-45 (2 Cir. 1972). That test was met here not only as to Frank and Miller but also as to Hemlock and Hoffer.

III. *The "fictitious name" statute*

The fictitious name statute, originally adopted in 1889, 25 Stat. 873, and codified as part of Chapter 63 of Title 18 relating to Mail Fraud, reads as follows:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of

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[11] Appellate counsel for Hoffer suggests that the decision of trial counsel not to call this defendant was based simply on a belief that, despite the contrary ruling of the trial judge, the Government had not presented a sufficient case to warrant that course. Perhaps so, but the defendant is bound by the strategy that was chosen.

> this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal car, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

It is not entirely clear what advantage the Government derives from invoking this statute, particularly in a mail fraud case where there is a conspiracy charge, since it applies only when the prosecution has established a "purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business." Be that as it may, the Government did invoke it here and, if it did so erroneously, there would have to be a reversal not only of the convictions under Counts 6 and 7 but perhaps also of the conviction on the conspiracy charge, Count 1, since the judge instructed that a finding of a conspiracy to violate § 1342 would warrant a conviction on the conspiracy count.[12]

Defendants say there was no evidence that any participant used or assumed or requested to be addressed by any

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[12] We say "perhaps" because a conviction of conspiracy to violate § 1342 under the circumstances of this case arguably would include a finding of conspiracy to violate § 1341. *United States* v. *Jacobs*, 475 F.2d 270, 282-84 (2 Cir. 1973); *United States* v. *Alsondo*, 486 F.2d 1339, 1347 n. 5 (2 Cir. 1973) (on rehearing).

fictitious, false or assumed name. Not disputing the literal truth of this[13], the Government contends that the statute should not be read so narrowly but should be construed to cover a situation where persons having no substantive interest, *e.g.*, Kay, Miss Comeau, Columbia, Splindian, Hepburn and Miss Neill, are inserted into a fraudulent transaction for the sake of concealing the identities of the true beneficiaries of the scheme, even though the individuals and corporations are using their actual names. This construction seems reasonable. It was essential to the fraud that the purchasers on the second round should not be Frank and Miller, or even corporations in which they appeared to have an interest. In that sense the defendants did utilize an identity other than their own to conceal their role in the fraud.[14] Such meagre case law as exists seems to support the application of §1342 to facts such as these, in result if not in discussion. *See e.g., United States*

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[13] The Government does not urge that defendant Borgman's use of the name Miller satisfies the statute; apparently Borgman had been calling himself Miller for some time and Mrs. Dominguez was in no way deceived by this. It does urge that the jury could properly have found that "Lefkowitz" was not the shadowy individual's real name. We doubt there was sufficient evidence of this.

[14] The fact that the name used by the defendant belongs to a real person has long been held insufficient to avoid the reach of § 1342. It is the defendant's use of a name other than his own to obscure his identity that constitutes the offense. *United States* v. *Etheredge*, 140 F. 376, 380 (N.D. Ala. 1905). Prosecutions for fraudulent misuse of credit cards have typically involved the use of names of real persons. See, *e.g.*, *United States* v. *Bonanno*, 430 F.2d 1060 (2 Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Chason*, 451 F.2d 301 (2 Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *United States* v. *Madison*, 458 F.2d 974 (2 Cir.), *cert. denied*, 409 U.S. 859 (1972).

v. *Kyle,* 257 F.2d 559 (2 Cir. 1958), *cert. denied,* 358 U.S. 937 (1959); *United States* v. *Baren,* 305 F.2d 527 (2 Cir. 1962); *Atkinson* v. *United States,* 344 F.2d 97 (8 Cir.), *cert. denied,* 382 U.S. 867 (1965); *cf. United States* v. *Ellicott,* 336 F.2d 868 (4 Cir. 1964).

IV. *Alleged receipt of inadmissible hearsay*

Two complaints are made with regard to the receipt of allegedly inadmissible hearsay.

The first, relating to certain statements of Kay to the notary, need not detain us long. Apart from the point that there may well have been sufficient evidence to link Kay with the conspiracy under the standard prescribed in *United States* v. *Geaney,* 417 F.2d 1116, 1119-20 (2 Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970),[15] our attention has not been called to any statement of Kay's that was received to prove the truth of a matter asserted in the statement. Instead, his remarks served only to prove his knowledge of facts otherwise established or to shed light on his several transactions with the notary. See *United States* v. *Annunziato,* 293 F.2d 373, 376-77 (2 Cir.), *cert. denied,* 368 U.S. 919 (1961); *United States* v. *Costello,* 352 F.2d 848, 853-55 (2 Cir. 1965), *rev'd on other grounds sub nom. Marchetti* v. *United States,* 390 U.S. 39 (1968); McCormick,

[15] This is an appropriate place to note and reject the argument that the Government's proof failed because the excess of the amount paid by Planinvest over that received by Dr. Hori and Mtre. Solomon may have gone to Kay, rather than to the defendants. If Kay was a fellow conspirator, that would be immaterial. Moreover, there was ample evidence that the large sums remaining in the Nassau branch of FNCB were accessible to Frank, Hemlock and Hoffer rather than to Kay, and were removed by them.

Evidence § 249 (Cleary ed. 1972). No matter how often appellate courts and commentators seek to explicate the true nature of the rule, the motion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard.

A more troubling question concerns the admissibility against Hemlock and Hoffer of the admissions by Frank and Miller at their final meeting with Mrs. Dominguez. The serious argument here is not that there was inadequate proof *aliunde* of the conspiratorial relation among the four men but that the admissions were not in furtherance of an on-going conspiracy.[16]

We have little difficulty in holding that despite *Krulewitch* v. *United States,* 336 U.S. 440 (1949), *Lutwak* v. *United States,* 344 U.S. 604 (1953), and *Grunewald* v. *United States,* 353 U.S. 391 (1957), the conspiracy to defraud Mrs. Dominguez was continuing as late as September 24. The basis of *Krulewitch* was "that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her," 336 U.S. at 442; the Court rejected the argument "that even after the central criminal objectives

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[16] The Government claims that no objection was made to the admission of this testimony; the defendants counter that the judge had ruled that he would provisionally admit all declarations of alleged conspirators subject to a subsequent blanket motion to strike evidence the admission of which was not warranted under the conspiracy excepton and that such a motion was made. While we appreciate the judge's desire to expedite the trial, we are not sure of the wisdom of departing so far from the requirement of specific and reasoned objection to a particularly crucial piece of evidence.

of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment [from the government] as its sole objective." 336 U.S. at 443. *Lutwak* and *Grunewald* added nothing more, although Mr. Justice Harlan's opinion in the latter is useful for its explication, 353 U.S. at 402:

> Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

Here the conspiracy could well be regarded as not simply to perpetrate the two frauds here described. The evidence suggests that the conspirators thought they had a good thing in Mrs. Dominguez and would defraud her further if the opportunity arose. More important, the conspiracy even as to the two parcels was not complete so long as Mrs. Dominguez was threatening to get the money back.

There is more of a problem in holding that the declaration was in *furtherance* of the conspiracy, a requirement to which we have adhered. *United States* v. *Annunziato supra,* 293 F.2d at 380. If Frank and Miller had simply admitted the overpayment, we would see no basis for such a ruling. However, they went beyond this and offered an explanation which they apparently thought with however little basis would turn away Mrs. Dominguez or at least diminish her ire and the consequent zeal of her pursuit. In any event, although no one has made the point, we do not see why the admission of the diversion of Planinvest's funds to an unauthorized purpose was not a declaration against pecuniary interest by a declarant unavailable to testify, see McCormick, Evidence §§ 276, 277, 280 (Cleary ed. 1972).

Appendix A

V. *Receipt of testimony concerning Bahamian bank transactions*

The Government's case rested heavily on the testimony of Latvis, former manager of the FNCB Nassau branch who is no longer with the Bank and his secretray Miss Reilly now employed at its branch in Tarrytown N. Y. Appellants contend that because of the Bahamian Bank Secrecy Act the court should not have permitted Latvis or Miss Reilly to testify about the various banking transactions at the FNCB Nassau branch. The Bahamian Bank Secrecy Act provides under penal sanction, that

> Except for the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of a bank or of the customers of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act.

The district court authorized the submission to a Bahamian court of an International Request for Judicial Assistance, contemplated by the Bahamian Act, for the disclosure of the records here relevant. Justice J. A. Smith granted the request on May 31, 1973, but his order was stayed pending an appeal but not later than June 30. Before that date the trial here was concluded.

We do not read our decisions dealing with the application of bank secrecy laws to American banks whose foreign branches are governed thereby, *First National City Bank* v. *I.R.S.*, 271 F.2d 616 (2 Cir. 1959), *cert. denied,*

361 U.S. 948 (1960); *Application of Chase Manhattan Bank,* 297 F.2d 611 (2 Cir. 1962); *United States* v. *First National City Bank,* 396 F.2d 897 (2 Cir. 1968); and *Trade Development Bank* v. *Continental Ins. Co.,* 469 F.2d 35, 39-42 (2 Cir. 1972), to go as far as appellants urge. In *Application of Chase Manhattan, supra,* the case most favorable to the appellants, we simply declined, on the facts there presented to use the process of our courts to force an American bank doing business in a foreign country to take action in that country which would constitute a crime. It is not at all clear that under the principles normally applied in the interpretation of criminal statutes the revelations by Mr. Latvis and Miss Reilly in New York would constitute a crime under Bahamian law. Even if it would no principle of accommodation requires the United States to seal the lips of American citizens testifying to facts within their knowledge concerning activities of other Americans in a foreign country as part of a scheme to violate American criminal law simply because that country chooses to throw a veil of secrecy around bank accounts except insofar as their courts may see fit to lift it. We thus have no occasion to consider the Government's contention that the balance struck in the cited decisions requires reconsideration favorable to it because of enactment of The Bank Secrecy Act, 84 Stat. 1114.

VI. *The use of an interpreter*

The question of Mrs. Dominguez' need for a Spanish interpreter had been discussed at a pretrial hearing. The Government represented that it would establish such a need at the trial. Counsel for one of the defendants objected on the ground that Mrs. Dominguez was fluent in

English and that permitting her to have the services of an interpreter would give her an undue advantage in cross-examination. The judge refused to conduct an evidentiary hearing on Mrs. Dominguez' proficiency in English saying that in all probability he would permit an interpreter to stand by and allow Mrs. Dominguez to use her when and if needed.

Over objection an interpreter was sworn at the beginning of the trial. After satisfying himself that Mrs. Dominguez spoke and understood English, the judge decided to take her testimony in that language but advised her to communicate with him if she needed a Spanish interpreter. The direct examination was conducted almost entirely in English. However on cross-examination the witness on several occasions resorted to the interpreter without prior authorization from the court. Over repeated objection by defense counsel the interpreter answered roughly a dozen questions for her during her day-long cross-examination.

We are not altogether happy about the manner in which this matter was handled. The reason initially given by the Government for having an interpreter, that Mrs. Dominguez speaks Spanish "nearly 70 per cent of the time," seems to backfire; if the Government meant that she spoke English 30 per cent of the time, this is quite a lot. Its argument that "as early as the fifth page of direct examination, it was clear that an interpreter would be periodically required" is rather disingenuous. The interpreter was there required only to help Mrs. Dominguez explain that a bank account opened by her mother on her attaining 21 was a "savings account." She went on for 40 pages without requiring further assistance. On the second occasion she relied on the interpreter simply to help her

describe Frank and Miller's "assassination" explanation at the final meeting. She then concluded her direct examination without further need of the interpreter's aid. We assume defendants would have raised no objection to the use of an interpreter solely for technical terms or five syllable words. Certainly such limited use of an interpreter would have been perfectly proper. The defendants' point is different. They claim that if Mrs. Dominguez could do that well on direct examination, there was no need for the more extensive reliance on the interpreter that occurred on cross.

The argument is not quite so strong as it seems. Mrs. Dominguez had appeared before the grand jury and had doubtless gone over her testimony with the prosecutor. Her relative familiarity with the lines taken on direct examination almost certainly enhanced her ability to understand the questions and respond in English. The surprise of cross-examination is a different matter. Still we are disturbed by her occasional resort to the interpreter when a cross-examiner seemed to approach at least a minor success. Here again see note 16 the judge may have been the victim of his ground-rule forbidding counsel to state the basis for their objections without special permission; counsel might have suggested such courses as a slackening of speed rephrasing of questions by the interrogator or the court or enforcement of the judge's directive that Mrs. Dominguez request permission to use the interpreter on each occasion when the need arose. On the other hand, the jury observed what was going on and defense counsel were free to comment on it in their summations, as one of them did. Counsel have cited no case where a conviction has been reversed because of the improper use of an interpreter, although, despite *Perovich* v. *United States*,

205 U.S. 86, 91 (1907), there have been some reversals for refusal to appoint one, obviously a stronger case. See 3 Wigmore, Evidence § 811, at 277-78 & n. 2 (Chadbourn rev. 1970); *United States* v. *Desist*, 384 F.2d 889, 901-03 (2 Cir. 1967), *aff'd without discussion of this point*, 394 U.S. 244 (1969); *United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-90 (2 Cir. 1970); *United States* v. *DiazBerrios*, 441 F.2d 1125, 1127 (2 Cir. 1971). All things considered, we find no abuse of discretion by the judge sufficiently prejudicial to require a reversal.

VII. *The instructions and refusal to instruct concerning the effect of a conviction on Mrs. Dominguez' civil suit*

At the conclusion of his charge to the jury, Judge Pollack asked the parties to submit exceptions to the instructions he had given. After the defendants had raised several objections, he commented, "You know, I am a little disturbed over the fact that you are sitting here with these things that you had for some days." The Government he pointed out, had submitted elaborate requests to charge, and a supplementary request relating to the relationship between a criminal conviction and a subsequent civil suit. He noted that the defendants had neither submitted requests to charge nor objected to any of the Government's requests prior to his delivering the charge. Not surprisingly the judge's instruction on the effect of a conviction on Mrs. Dominguez' civil suit was heavily influenced by the Government's request.

The judge began by pointing out, quite correctly, that "The pendency of a private civil lawsuit referring to the transactions mentioned here is no defense to this indict-

ment" and by explaining the different functions of criminal prosecutions and civil suits. He went on however, to say:

> Thus, a conviction in a criminal action does not support a subsequent civil judgment in a case of this sort based on the same transactions because each of such proceedings has a totally different object. In addition, they are dissimilar in terms of parties, rules and procedures.
>
> Where defendants in a criminal prosecution of this kind are sued in a civil trial based on the same transactions, the two proceedings are completely unrelated, except only in respect of whether the civil matter may bear on the issue of credibility. That is to say, if the defendants are convicted in the criminal action, the plaintiffs in the civil suit will still have to prove their entire case for damages before a new jury or judge and could in no way rely on defendant's prior conviction to sustain their claim.

He later gave a fairly detailed "interest" charge with respect to credibility, instructing the jury as follows:

> In weighing the testimony of the witness, you can consider their relationship to the Government or to the defendant, as the case may be, and any bias or interest in the outcome of the case. . . .
>
> Interest creates a motive for false testimony. The greater the interest, the stronger the motive for false testimony. In appraising credibility you may take that fact into consideration. However, it by no means follows that simply because a person

> has a vital interest in the end result, he or she is not capable of telling a truthful, candid and straightforward story.
>
> It is for you to decide to what extent, if at all, any interest of the witness has affected or shaded the testimony.

When the time came for making objections, trial counsel for Hoffer excepted "to what was the Government's supplementary charge with respect to the civil lawsuit and the language used by the Court." While this alone would have been too general, counsel for Frank amplified it, saying that

> I think that the outcome of the criminal case is definitely a matter that can be related to the civil case in the sense that if there is a conviction, the jury's verdict could be deemed to be res judicata in the civil suit even though you have different parties on the same subject matter and where the evidence would be identical.

After counsel elaborated further on this point, the judge noted that he had given "a very strong interest charge." Counsel conceded this and on that account withdrew "any exception to the statement that the civil suit will be no defense—", at which point the judge interrupted. It may be that if he had not, counsel would also have withdrawn the objection to the remarks that "a conviction in a criminal action does not support a subsequent civil judgment in a case of this sort based on the same transactions," that "the two proceedings are completely unrelated, except only in respect of whether the civil matter may bear on the issue of credibility," and that Mrs. Domniguez "could

in no way rely on defendants' prior conviction" in her civil suit; but we cannot find that any such withdrawal occurred. The issue is academic in any event since counsel for Hemlock then requested that the judge charge, "in connection with the civil suit . . . that the jury may consider the question of motive or interest of such witness or party because she stands to gain something in the event of a conviction in this case." In response to this, the judge gave an additional instruction[17] which does not seem to have added or subtracted anything.

Defendants' claim is that, in a diversity action in the Southern District of New York, the court would be bound to follow New York law on the collateral estoppel effect of a criminal conviction in a subsequent civil suit by a private person. The highest court of New York, they note, has recently held that under modern principles a criminal conviction is conclusive in any subsequent civil action as to any issues necessarily determined against the defendants in the criminal case, *S.T. Grand, Inc.* v. *City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938 (1973) (federal judgment convicting plaintiff corporation and its president of bribing City Water Commissioner precludes relitigation of validity of ensuing contract), and that the quoted instructions were thus in error.

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[17] "Now, I believe I have sufficiently charged you on the issues of interest and motives and the things that you have to keep your eye on and what you are really here to decide, and in an excess of caution I will say to you that there is no doubt that Mrs. Dominguez has a civil suit pending. I think I have sufficiently indicated to you what the relationship is between that suit and this, other than the fact that naturally she is a litigant and has an interest in that civil suit, and you may consider her testimony accordingly."

The Government challenges defendant's legal position.[18] Relying on *Kern* v. *Hettinger,* 303 F.2d 333, 340 (2 Cir. 1962), it argues that the question of the effect of convictions in this case in a civil suit in a federal district court is one of federal law and, implicitly, that it should be decided in the negative.

We do not accept either branch of the Government's argument. *Kern* v. *Hettinger, supra,* held only that whether a dismissal in a diversity action by a federal district court in California was to be read as being with or without prejudice must be determined in accordance with F.R. Civ. P. 41 rather than by the California state rule. Citing *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525 (1958), the court ruled that in a clash between state law principles and the Federal Rules of Civil Procedure, the Federal Rules would prevail. See *Hanna* v. *Plummer,* 380 U.S. 460 (1965). The *Kern* case would be relevant if, but only if, some competent federal authority had decreed that a federal criminal conviction should not have collateral estoppel effect in private civil litigation. Since we know of no such decree, we see no reason why the district court seized of Mrs. Dominguez' diversity action should not endeavor to reach the same results as would a New York court sitting "a block away". *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 109 (1945). See *Berner* v. *British Commonwealth Pacific Airlines, Ltd.,* 346 F.2d 532, 539-40 (2 Cir. 1965) *cert. denied,* 382 U.S.

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[18] The Government has not sought to distingush *Grand* on the basis that there collateral estoppel was being used by New York City defensively whereas Mrs. Dominguez would be using it offensively. In view of the New York court's earlier decision in *B. R. De Witt, Inc.* v. *Hall,* 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967), the failure to raise this point seems to have been well-advised.

983 (1966); *Breeland* v. *Security Insurance Co. of New Haven,* 421 F.2d 918, 921 (5 Cir. 1969).

Even if the question of the effect of a conviction on relitigation of the fraud in Mrs. Dominguez's civil suit were to be determined by federal law, our abandonment of the mutuality requirement in *Zdanok* v. *Glidden Co.,* 327 F.2d 944 (2 Cir.) *cert. denied,* 377 U.S. 934 (1964); see also *United States* v. *Webber,* 396 F.2d 381 (3 Cir. 1968); *James Talcott, Inc.* v. *Allahabad Bank, Ltd.,* 444 F.2d 451 (5 Cir.) *cert. denied,* 404 U.S. 940 (1971); *Bernhard* v. *Bank of America National Trust & Savings Ass'n,* 19 Cal. 2d 807, 122 P.2d 892 (1942), now approved by the Supreme Court so far as concerns defensive use of collateral estoppel, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), would lead us to hold that a conviction here will operate as collateral estoppel in favor of Mrs. Dominguez in her civil suit, although neither *Zdanok* nor *Blonder-Tongue* involved the criminal-civil interplay. It is true, as the Government suggested at argument, that such a holding may subject complaining witnesses in federal criminal trials to more severe attacks on credibility than would otherwise be the case. Arguably, and perhaps more seriously, it provides too tempting a reward for overstatement or even perjury. While such fears are not utterly without basis, we think they are overcome by the desirability of a rule that a fact once established, after full and fair trial, beyond a reasonable doubt, should not have to be relitigated in a context where a preponderance of the evidence is all that is required. As the Fifth Circuit noted in *Breeland* v. *Security Insurance Co. of New Haven, supra,* 421 F.2d at 922, citing many cases, in attempting to predict a decision by the Supreme Court of Louisiana, "The number of jurisdictions holding that a criminal conviction precludes litiga-

tion of the same issue in a civil suit is ever increasing." We see no reason why federal courts should not follow the general trend—a trend which they have played a not inconsiderable part in bringing about.

It does not follow, however, that a judge must deliver a lecture on the law of issue preclusion in charging a jury with respect to the credibility of a complaining witness who has instituted a civil suit. A full statement of the conditions on the application of collateral estoppel and the limitations on its scope would be more likely to confuse than to enlighten. It would suffice to say that a conviction could operate to the advantage of the plaintiff in the civil suit, or, as counsel for Hemlock requested, that the witness "stands to gain something in the event of the conviction in this case." In determining whether the charge as given not only was error but requires reversal, instructions like these afford the appropriate benchmark.

While the distance between the benchmark and the instructions that were given was still substantial, we do not think this single slip requires reversal under the principles with respect to errors not of constitutional dimensions laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 761-65 (1946).[19] The judge did not misinform the jury as to the elements of the crimes or as to anything relating to the defendants themselves. His error related

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[19] Although the "harmless error statute construed in *Kotteakos*, § 269 of the Judicial Code, see 328 U.S. at 757, has been replaced by 28 U.S.C. § 2111, the views expressed in *Kotteakos* remain authoritative. See *United States* v. *Kahaner*, 317 F.2d 459, 485 (2 Cir.), *cert. denied*, 375 U.S. 836 (1963); *United States* v. *Birnbaum* 373 F.2d 250 (2 Cir.), *cert. denied*, 389 U.S. 837 (1967); 3 Wright, Federal Practice and Procedure (Criminal) § 853-54 (1969).

only to the degree of discount to be applied in evaluating the testimony of an adverse witness, albeit an important one, with respect to whom he had already given a full "interest" instruction. The jury had surely gotten the idea that Mrs. Dominguez was no longer a friend of the defendants and that she wished them ill. The degree of difference a charge like that sought by Hemlock's attorney would have created in weighing Mrs. Dominguez' credibility, let alone in determining the defendants' guilt, is too small to warrant a reversal. Our conviction "is sure that the error did not influence the jury, or had but very slight effect." 328 U.S. at 764.

Although content to rest decision on that basis, we add a word from which counsel could profit in the future. The course that defense counsel pursued in raising this objection to the court's charge seriously weakens their claim of prejudicial error. While counsel can "protect the record" for appellate review simply by objecting to instructions at the conclusion of the judge's charge, that is a poor way to proceed in a matter such as that here under discussion. The judge might reasonably be reluctant to submit a supplemental instruction or correct what he perceives to be minor inaccuracies in his earlier charge for fear that doing so would draw undue attention to the new instruction, or that the jury might be confused in attempting to determine what was withdrawn and what was left of the original charge. This case provides a good illustration of the dilemma in which the deferral of defense objections on a point raised by the Government's requests to charge can place a trial judge. With the jury ready to retire, he was suddenly forced to make a quick determination on a difficult point of law without the aid of any authority except that cited in the Government's request. Even if he had felt that there was merit in the defendants' point, he

would still have to decide on the spot how much of their suggested charge to adopt and how to deliver the supplemental charge in a manner that would convey its proper weight to the jury. Here, for example, a strong supplemental charge indicating that Mrs. Dominguez had a great deal to gain from the conviction of the defendants might well have suggested to the jury that the judge had had second thoughts about Mrs. Dominguez' credibility and now deemed her testimony likely to have been seriously distorted. If we thought the error more serious than we do, we would have to consider whether defendants should be allowed to secure a retrial because of an error which, though they did not invite, they had failed to take effective measures to prevent.

We have considered the few other points raised by defendants but do not believe them to have sufficient merit to warrant discussion.

The convictions are affirmed.

APPENDIX B

Order of the United States Court of Appeals, Second Circuit, Denying Petition for Rehearing *in banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy-four.

DOCKET No. 73-2384

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,

Defendants,

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, and STEPHEN BORGMAN, a/k/a Stephen Berman, a/k/a Steve Miller,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the appellant (John Joseph Frank), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX C

Order of the United States Court of Appeals, Second Circuit, Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

DOCKET NO. 73-2384

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,

Defendants,

JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, HARRY HOFFER, ALFRED J. HEMLOCK,

Defendants-Appellants.

Appendix C

A petition for a rehearing having been filed herein by counsel for the appellant (John Joseph Frank),

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX D

Statutory Provisions Involved

Title 18, United States Code, §371.

> Conspiracy to commit offense or to defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, §1341.

> Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing

such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §1342.

Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Appendix D

Whoever transports in interestate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious represen-

tation of an obligation or other security of the United States, or an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

Bahamian Bank Secrecy Law

Banks Amendment Act, §19.

(1) Except for the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court or competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of a bank or of the customer of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act.

(2) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding one thousand pounds or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

Banks and Trust Companies Regulation Act 1965, §10.

Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provision of any law of the Colony, no person shall disclose any information relating to any

application by any person under the provisions of this Act or to the affairs of a licensee or of any customer of a licensee which he has acquired in the performance of his duties or the exercise of his functions under this Act.